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No. 85-872

In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM T. SCHOR, ET AL., PETITIONERS

v.

CONTICOMMODITY SERVICES, INC., ET AL.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE COMMODITY FUTURES TRADING COMMISSION IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

KENNETH M. RAISLER
General Counsel

PAT G. NICOLETTE
Deputy General Counsel

WHITNEY ADAMS
Deputy General Counsel

ANNE H. WRIGHT
Attorney
Commodity Futures Trading Commission
Washington, D.C. 20581

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TABLE OF AUTHORITIES

Page

Cases:

Brown v. *Allen*, 344 U.S. 443 5

CFTC v. *Schor*, No. 84-1519 (July 2, 1985) 2

ContiCommodity Services, Inc. v. *Schor*, No. 84-1500 (July 2, 1985) 2

Schor v. *ContiCommodity Services, Inc.*, No. 84-1673 (June 17, 1985) 1-2

Thomas v. *Union Carbide Agricultural Products Co.*, No. 84-497 (July 1, 1985) 2

United States v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 5

Washington v. *Fishing Vessel Ass'n*, 443 U.S. 568 5

Statute and regulation:

Commodity Exchange Act, 7 U.S.C. 1 *et seq.* 1

17 C.F.R. 12.24 (1983) 2, 4

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The Commodity Futures Trading Commission, in its administrative reparations forum, adjudicated both the cross-petitioners' claim against cross-respondent Conti-Commodity Services, Inc., under the Commodity Exchange Act (CEA), 7 U.S.C. 1 *et seq.*, and Conti's state law counterclaim against cross-petitioners.[1] Cross-petitioners now contend that the Commission should also have adjudicated their state law claim of breach of contract against Conti, the very claim that this Court declined to review last Term. *Schor* v. *ContiCommodity Services, Inc.*, cert. denied,

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[1]Cross-petitioners are respondents in both No. 85-621, *CFTC* v. *Schor*, and No. 85-642, *ContiCommodity Services, Inc.* v. *Schor*. The Court granted these petitions and consolidated the cases on December 9, 1985.

No. 84-1673 (June 17, 1985).[2] Cross-petitioners' contention does not merit review because they did not properly raise their state law claim in the administrative proceeding.

1. a. The background and facts of this case are stated in detail at pages 2-9 of the petition in No. 85-621. When cross-petitioners filed their reparations complaint with the Commission, alleging that Conti had violated the CEA and Commission regulations, Conti responded and filed its counterclaim. Cross-petitioners responded to Conti's counterclaim by filing a reply as permitted by Commission Rule 12.24, 17 C.F.R. 12.24 (1983).[3] But in that reply, cross-petitioners did not allege a breach of contract or any state law defense, setoff, or counterclaim. Rather, cross-petitioners simply renewed their claim that Conti had violated the CEA and the Commission's regulations. See C.A. App. 495-503.

The case was then assigned to an Administrative Law Judge. The parties filed motions, conducted discovery, and filed pretrial briefs. A three-day hearing was held before the

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[2]Following the denial of cross-petitioners' previous petition, the Court granted petitions filed by the CFTC and Conti, vacated the court of appeals' judgment, and remanded the case for further consideration in light of *Thomas* v. *Union Carbide Agricultural Products Co.*, No. 84-497 (July 1, 1985). *ContiCommodity Services, Inc.* v. *Schor*, No. 84-1500 (July 2, 1985); *CFTC* v. *Schor*, No. 84-1519 (July 2, 1985). On remand, the court of appeals reinstated its prior judgment. See No. 85-621 Pet. 8-9.

[3]Commission Rule 12.24, 17 C.F.R. 12.24 (1983), provides:

> If the answer asserts a counterclaim, the complainant shall file a reply to the counterclaim with the Commission within thirty * * * days after service of the answer. The reply shall be strictly confined to the matters alleged in the counterclaim, and shall in all respects conform to the requirements set forth in § 12.23(b) with respect to the form and content and other requirements concerning an answer. A complainant may satisfy a counterclaim, as if it were a complaint, in the manner set forth in § 12.23(a).

ALJ at which several witnesses testified. After the hearing, cross-petitioners filed their post-trial brief and proposed findings of fact and conclusions of law, and Conti filed its post-trial brief. Throughout this time, cross-petitioners never raised a state law breach of contract claim. See C.A. App. 558-559, 619-689.

In their reply brief to Conti's proposed findings of fact and conclusions of law, cross-petitioners, for the first time, asserted that Conti's counterclaim "must be dismissed" because Conti had breached its contract with cross-petitioners by allegedly failing to abide by exchange margin rules. C.A. App. 806. The ALJ then announced his decision, which rejected cross-petitioners' claim under the CEA but upheld Conti's counterclaim and directed Conti to draft a proposed order. Cross-petitioners filed extensive objections to Conti's proposed order but did not mention their state law breach of contract claim. See C.A. App. 858-868. Since cross-petitioners had raised the breach of contract claim only in this half-hearted and untimely fashion, and since that claim, as a result, had not been a subject of the evidentiary proceedings, the ALJ, unsurprisingly, did not address it.

b. Cross-petitioners applied to the Commission for review of the ALJ's decision. One of the grounds they urged was that the ALJ had not ruled on their breach of contract claim. C.A. App. 900-903. Conti, in its response, objected that cross-petitioners had not raised that claim before the ALJ. *Id.* at 928-930. The Commission denied review. 85-621 Pet. App. 50a-52a.

c. Cross-petitioners then petitioned for review of the Commission's decision by the court of appeals. In their brief in the court of appeals, cross-petitioners asserted that the Commission had acted "unfair[ly]" in refusing to entertain

their breach of contract claim. Cross-Pet. C.A. Br. 28-29. The Commission, in its court of appeals brief, responded that this issue had not been properly raised in the administrative forum and thus was not appropriate for consideration by the court of appeals. CFTC C.A. Br. 22-25. The Commission explained to the court of appeals that its regulations would permit a reparations claimant to raise a state law defense to a broker's counterclaim but that, under Commission procedures, cross-petitioners' failure properly to raise the claim in the reparations forum constituted a waiver. *Id.* at 24 n.28, 25; see 17 C.F.R. 12.24 (1983). The Commission further explained that the question whether a reparations claimant could file a state law counterclaim to a broker's state law counterclaim had never been ruled on by the Commission because it was not properly raised by cross-petitioners and, in fact, had never arisen in the entire history of the reparations program. CFTC C.A. Supp. Br. 18 n.14.[4] The court of appeals did not address cross-petitioners' contention that the Commission erred by not considering their breach of contract claim.

2. Cross-petitioners now contend that this Court should decide whether the Commission is "authorized to entertain the customer's state law claims in the nature of defenses, setoffs and counterclaims to the broker's counterclaim." 85-872 Pet. i. As cross-petitioners admit, "this Court has previously denied a Cross-Petition for Certiorari filed by these Cross-Petitioners which was identical to the current Cross-Petition." *Id.* at 10; see page 1, *supra*. Cross-petitioners offer no new reason for review.[5]

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[4]The court of appeals incorrectly suggested that the Commission is "ambivalent" on this question. 85-621 Pet. App. 44a. In fact, the question simply has never arisen, and the Commission accordingly has not had occasion to take a position on it.

[5]Neither of the cases on which cross-petitioners rely (Pet. 10) suggests that a party routinely may reapply for a writ of certiorari following the denial of a petition raising the same claim in procedurally identical

As we have demonstrated, cross-petitioners did not properly raise their state law breach of contract claim in the administrative forum. Review by this Court is therefore inappropriate. See, *e.g.*, *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). Moreover, because of cross-petitioners' failure properly to raise their breach of contract claim, neither that claim nor cross-petitioners' contention concerning the Commission's authority was ever addressed by the ALJ, the Commission, or the court of appeals. That is an additional reason for this Court to deny review.

Indeed, cross-petitioners and the Commission may not even be in disagreement on the question presented in the cross-petition. That question refers to "defenses, setoffs and counterclaims," and cross-petitioners have never explained into which category their state law breach of contract claim falls.[6] But as the Commission explicitly stated in the court of appeals, the Commission agrees with cross-petitioners that it has the authority to consider state law defenses to brokers' state law counterclaims. There may, accordingly, simply be no dispute for the Court to resolve on this issue. As the Commission also explained in the court of appeals, and as we noted above, the Commission has never had occasion—in this case or in any other case in the ten-year history of the reparations program—to decide whether to

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circumstances. See *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658, 672 n.19 (1979) (declining to treat as a final adjudication a prior denial of certiorari that "came at an interlocutory stage in the proceedings"); *Brown* v. *Allen*, 344 U.S. 443, 489-497 (1953) (opinion of Frankfurter, J., in substance expressing the views of the Court) (denial of certiorari on direct review in state criminal case should not be accorded legal significance by district court in subsequent habeas proceeding).

[6]That lack of clarity is directly attributable to cross-petitioners' failure to plead their breach of contract claim in response to Conti's counterclaim.

assert the authority to adjudicate reparations complainants' state law counterclaims to brokers' counterclaims.[7] The Commission had no reason to consider its authority to entertain cross-petitioners' state law claim because that claim was not properly raised. Plainly this Court should not decide the scope of the Commission's authority in this area when neither the Commission itself nor any court has taken a position on that issue.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

KENNETH M. RAISLER
General Counsel

PAT G. NICOLETTE
Deputy General Counsel

WHITNEY ADAMS
Deputy General Counsel

ANNE H. WRIGHT
Attorney
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[7]The Commission also has arrived at no view concerning setoffs in general, although some of what are called "setoffs" are in fact properly treated as affirmative defenses.